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7
                    UNITED STATES DISTRICT COURT
8
                   NORTHERN DISTRICT OF CALIFORNIA
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   NETFLIX, INC., a Delaware corporation,   Case No. C 06 2361 WHA (JCS)
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                                Plaintiff,   **NETFLIX'S RESPONSE TO**
12   **BLOCKBUSTER'S CRITIQUE OF THE**
         v.   **COURT'S TENTATIVE CLAIM**
13   **CONSTRUCTION ORDER**
   BLOCKBUSTER, INC., a Delaware
14 corporation, DOES 1-50,
                                               Complaint filed: April 4, 2006
15   Defendant.

16
   AND RELATED COUNTERCLAIMS
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NETFLIX'S RESPONSE TO BLOCKBUSTER'S CRITIQUE OF THE COURT'S TENTATIVE CLAIM
CONSTRUCTION ORDER
CASE NO. C 06 2361 WHA (JCS)

1   Netflix respectfully submits these comments in response to Blockbuster's critique of the

2   Court's February 9, 2007 Tentative Claim Construction Order ("Blockbuster Critique"). Netflix

3   has no objection to many of Blockbuster's proposed revisions, but believes that certain of the

4   proposed revisions should not be adopted for the reasons set forth below.

5   **Sections II.A and II.B of the Blockbuster Critique.** Netflix has no objection to the

6   proposed revisions Blockbuster describes in these sections. Netflix wishes to point out, however,

7   that page 4, lines 18-19 of the Court's Order should read "Claim 39 depended from claim 34,"

8   not "Claim 34 depended from claim 39" as Blockbuster suggests.

9   **Section II.C of the Blockbuster Critique.** Netflix has no objection to the proposed

10   revisions set forth in Section II.C.1 and Section II.C.2.

11   Blockbuster's proposed revisions contained in Section II.C.3 are incorrect and should not

12   be adopted. Blockbuster proposes to revise the Court's Order to state that the "rental queue may

13   reflect the provider's priorities in addition to customer preferences." Although Netflix believes

14   that the provider, as the entity that controls the queue, will always have its priorities reflected in

15   the queue, that is not Netflix's main concern with Blockbuster's proposed change. It appears

16   that Blockbuster is proposing that the queue "may reflect . . . customer preferences," and thus

17   that the queue need not necessarily reflect customer preferences at all. For the reasons discussed

18   below, that proposed revision is incorrect, and the Court should reject Blockbuster's proposed

19   injection of the word "may."

20   This proposed elimination of the customer's role in determining the order in which

21   movies are to be sent also appears in Blockbuster's proposed revision of the Order to read that

22   "the ordered list includes items for possible rental to the customer, the order may be determined

23   in whole or in part by the customer, but may also be based on some default or other order."

24   Thus, Blockbuster is suggesting that the Court should move away from the concept that the

25   ordered list reflects (at least in part) the order desired by a customer. At a minimum, the

26   customer's preferences must be reflected, to some extent, in the order of the "ordered list." As

27   Netflix explained in its critique submitted on February 13, 2007, the list of movies can only be

28   ordered (*i.e.*, prioritized) by the customer. While movies may be selected by the provider and

1 listed in a default sequence, they are not prioritized until the customer changes or accepts that

2 list, at which time the sequenced list becomes an "ordered list." Therefore, to suggest that the

3 "ordered list" could be created without any input from the customer does not follow from the

4 patent.

5   In Section II.C.3 and Section II.C.4 of the Blockbuster Critique, Blockbuster contends

6 that the phrase "default order" found at page 10, line 28 of the Order should be revised to read

7 "default or other order," while the phrase "some other default order" found at page 11, line 13

8 should be changed to "some other or default order." Neither of these changes, which would

9 inject unnecessary confusion regarding the types of possible orders, should be adopted.

10 Blockbuster claims that "a 'default' order is an example of, but not a limitation on, the other

11 types of order that could be used for the 'ordered list.'" Blockbuster Critique at 3:2-3. But

12 Blockbuster offers no inkling of what sort of orders could exist, or be used, aside from (i) the

13 order desired by the customer or (ii) a default order utilized by the provider. To be sure, there

14 are many different sorts of default orders that a provider could use, but each is still a default

15 order, not an undefined "other" order. And Blockbuster's suggestion that the *queue* can be

16 ordered based on factors desired by the provider, *see* Blockbuster Critique at 3:5, supplies no

17 reason to modify the language it wishes to change, which addresses the *ordered list*, not the

18 *queue*. Therefore, Blockbuster's proposed changes to that language should be rejected.

19   In Section II.C.5, Blockbuster asserts that the Court should "simplify[]" its claim

20 construction by removing the phrase "based on information received from the customer via the

21 Internet" from the definition of the claim term "electronically updating." However, the Court

22 correctly recognized but a few lines prior to its definition that "the device that performs the

23 function [of electronically updating] must be able to receive information in this manner [over the

24 Internet]." Tentative Order at 15:19. Given that plain requirement, it would be helpful to the

25 jury's understanding of the claims to make explicit that whatever device is employed for the

26 electronic updating function must do so based on the information that it receives from the

27 customer via the Internet. Blockbuster's proposed revision should therefore not be adopted.

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NETFLIX'S RESPONSE TO BLOCKBUSTER'S CRITIQUE OF THE COURT'S TENTATIVE CLAIM
CONSTRUCTION ORDER
CASE NO. C 06 2361 WHA (JCS)

1   Dated: February 14, 2007.   KEKER & VAN NEST, LLP

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                                            By: ___/s/ Eugene M. Paige_____
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                                                   Attorneys for Plaintiff
5   NETFLIX, INC.

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